IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-606

FRANCIS LEO MARKS,
Petitioner,

vs.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals

for the Sixth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTORY STATEMENT

The Petitioner, Francis Leo Marks, respectfully petitions this Honorable Court for a Writ Of Certiorari to review the Opinion and Order of the United States Court of Appeals for the Sixth Circuit filed in this proceeding on July 21, 1977, reversing orders of the United States District Court for the Southern District

of Ohio suppressing evidence in this federal criminal prosecution and remanding the case.

The Opinion of the United States Court of Appeals for the Sixth Circuit is appended, bound with this Petition, and marked Appendix "A".

Petition for Rehearing was denied by the United States Court of Appeals for the Sixth Circuit on August 29, 1977, and the Order denying the Petition for Rehearing is appended, bound with this Petition, and marked Appendix "B".

This Honorable Court's Order extending Petitioner, Francis Leo Marks', time to file his Petition for Writ of Certiorari to October 28, 1977, is appended, bound with this Petition, and marked Appendix "C".

JURISDICTION

The Opinion and Order of the Sixth Circuit was filed on July 21, 1977. A timely Petition for a Rehearing was denied by the Sixth Circuit on August 29, 1977, petitioner's time to file his Petition for Writ of Certiorari was extended to

and including October 28, 1977, by Associate Justice Potter Stewart of this Honorable Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Petitioner states that Consolidation Coal Company, a co-appellee, in Case No. 76-2518, in the Court of Appeals for the Sixth Circuit, has filed a Petition for a Writ of Certiorari in this case; and this petitioner has been informed that Robert Lasick, Richard Schrickel, and Raymond Zitko, co-appellees, in Case Nos. 76-2519, 76-2520 and 76-2522, respectively, in the Court of Appeals for the Sixth Circuit, are also filing Petitions for a Writ of Certiorari.

QUESTIONS PRESENTED

1. Whether the less stringent showing of probable cause required to obtain search warrants to conduct routine administrative compliance inspections is sufficient under the Fourth Amendment to justify the issuance of warrants to conduct searches and seizures in offices where the purpose of the searches and seizures is the discovery of

evidence of suspected criminal violations of the Federal Coal Mine Health and Safety Act of 1969?

2. Whether a federal coal mine inspector's statutory right of entry into a "coal mine" for the purposes of making inspections and investigations gives rise to the right to obtain an administrative warrant to force entry into petitioner's private offices and to search for and seize records and other personal property contained therein?

3. Whether the affidavits used to obtain the search warrants at issue supply the requisite probable cause?

4. Whether a corporate supervisory employee has standing as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41(e) to challenge the searches and seizures of evidence from Consolidation Coal Company's six corporate offices where said employee is: (1) the chief environmental technician and is the immediate supervisor of each individual environmental

technician; (2) as chief environmental technician is responsible for maintaining all of said corporation's respirable dust records, which records were the object of the government's search and seizure; and (3) as chief environmental technician conducts corporate business in each of the corporate offices searched?

5. Is the government entitled to an evidentiary hearing pursuant to Federal Rule of Criminal Procedure 41(e), when it never requests such a hearing, nor does it challenge the factual allegations of the person asserting his position as a person aggrieved pursuant to Federal Rule of Criminal Procedure 41(e)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

and the persons or things to be seized.

The provisions of the Federal Coal Mine Health and Safety Act of 1969 relevant to the issues raised in this case are lengthy and have therefore been set forth in the Appendix attached to this petition. The sections involved are:

Section 103 (30 U.S.C. §813), entitled "Inspections and Investigations";

Section 108 (30 U.S.C. §818), entitled "Injunctions"; and

Section 108 (30 U.S.C. §819, entitled "Penalties".

STATEMENT OF THE CASE

On May 21, 1974, at the request of attorneys from the Government Regulations and Labor Section, Criminal Division, United States Department of Justice, a federal magistrate issued search warrants[1] relating to various offices in Consolidation Coal Company's (Hereinafter: Consol)

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1. The six search warrants involved in this case, with attached returns and affidavits, have been reprinted in the Appendix to co-petitioner's, Consolidation Coal Company's, Petition for a Writ of Certiorari in this case at Pages 49a - 95a.

Central Division in Eastern Ohio.

All of the warrants but one were based upon the affidavit of William E. Holgate, an employee of the Mining Enforcement and Safety Administration of the Department of the Interior. The remaining warrant was supported by both Holgate's affidavit and that of Thomas A. Jeskey, a federal coal mine inspector.

The Holgate and Jeskey affidavits referred to information obtained from an unnamed former employee of petitioner concerning alleged irregularities in the respirable dust sampling program at certain mines of Consol. The affidavits recited that evidence of violations of criminal provisions of the Federal Coal Mine Health and Safety Act of 1969 was believed to be concealed in the offices to be searched.

The warrants were executed in a surprise raid on May 22, 1974, by federal inspectors who had been appointed special deputy marshals. There was no prior demand upon petitioner or Consol for the desired materials.

In the searches and seizures conducted pursuant to the warrants, the deputy marshals confiscated from Consol's private offices and petitioner's private office a great mass of books, note pads, folders and cassettes, as well as metal file card containers, entire file cabinets or drawers, and a set of scales.

In the Summer of 1975, indictments were returned against petitioner, Consol and seven of Consol's current or former employees charging numerous separate violations of two criminal provisions of the Coal Mine Health and Safety Act, as well as two counts of criminal conspiracy. The indictments were based, entirely or primarily, upon the documents seized in the May 1974 raid and the fruits of such seizures.

Accordingly, Consol filed a motion to suppress various items of evidence taken from certain buildings and mines belonging to Consol. Said property was subsequently found by the district court to be taken by means of invalid and defective search

warrants and said evidence was ordered by the Court on June 10, 1976, to be suppressed as to Consol.

The district court's order of June 10, 1976, granted Consolidation Coal Company's motion to suppress the evidence seized from the following locations, to-wit:

(1) The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;

(2) The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio;

(3) The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio;

(4) The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale Harrison County, Ohio;

(5) The mine office, Oak Park No. 7 coal mine of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio;

(6) The mine office, Friendship Park Highwall No. 15 coal mine, of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio.

However, the district court ruled that each individual's motion to suppress was denied without prejudice, because said defendants had to demonstrate their standing as a "person aggrieved" by the government's searches and seizures. (Appendix 20a and 21a) Thus, on July 14, 1976, petitioner filed his Motion To Suppress and Memorandum In Support Of Motion To Suppress By Defendant Francis Leo Marks.

In said Motion To Suppress and Memorandum in Support thereof petitioner set forth the following facts, to-wit:

(1) Defendant Marks was the Chief Environmental Technician of Consol's Midwest Region and in such capacity was the immediate supervisor of each individual Environmental Technician;

(2) Defendant Marks was responsible for the maintaining of all respirable dust records;

(3) Defendant Marks was present during the search and seizure at the Georgetown office;

(4) Defendant Marks visited each mine office regularly and conferred with the environmental technician at each mine office; and

(5) That the evidence seized was to be used against Defendant Marks and was evidence of an essential element of the crimes with which this defendant was charged.

The government further admitted the following facts as to petitioner in its Memorandum filed with the district court on September 14, 1976, opposing Petitioner Marks' Motion To Suppress, to-wit:

(1) Marks was the Chief Environmental Technician for Consol's Midwest Region;

(2) That Marks "had supervisory responsibility over the other technicians, their papers and their offices";

(3) That Marks had standing to contest the legality of the search of his office at Georgetown, Ohio;

(4) That Marks was present at his office on May 22, 1974, the day said offices of Consol were searched.

Further, the government neither contested any factual allegation of Petitioner, nor moved for an evidentiary hearing in this matter.

On October 4, 1976, the Court granted Petitioner's Motion To Suppress said evidence.

Respondent appealed under the provisions of 18 U.S.C. §3731, certifying that the suppressed

evidence was "a substantial proof of the charge[s] pending against the defendant[s]". On July 21, 1977, the Sixth Circuit reversed and remanded, a plurality of the panel holding, sua sponte, that the administrative standard of probable cause announced in Camara v. Municipal Court, 387 U.S. 523 (1967) and See v. City of Seattle, 387 U.S. 541 (1967) applied in this case and that the affidavits satisfied this less stringent test. Circuit Judge Engel, concurring in the result, concluded that the affidavits had met the more onerous standards of Aguilar and Spinelli, but found "certain issues relating to administrative searches and seizures covered [in the majority opinion] ...sufficiently troublesome...that... their resolution [should be saved] until the case arises which demands it". (Appendix 18a)

Further, the Sixth Circuit held in footnote 7 of its Opinion (Appendix 4a) that "The issue as to standing of Marks and Zitko to challenge

the searches is mooted by our disposition of their appeals on other grounds". Therefore, the Sixth Ciruit never passed on the standing question of this Petitioner.

REASONS FOR GRANTING THE WRIT

Petitioner's, Co-Petitioner, Consolidation Coal Company, has filed a Petition for a Writ of Certiorari in this case and in said Petition has thoroughly and adequately discussed why said Writ should issue on the first three questions presented in this case. Therefore, Petitioner Marks will not address himself to the first three questions presented, but rely upon and incorporate by reference into this Petition the reasons advanced by Consolidation Coal Company for granting its Writ of Certiorari in this case. However, this Petitioner will present to this Honorable Court his arguments as to Questions Presented Four and Five, which concern Petitioner's standing to challenge said searches at the six private mine offices under his supervision and control.

Further, we believe this case furnishes the Court an opportunity to clarify its decision in Brown v. U.S., 411 U.S. 223 (1973), as to the requirements necessary for a person to assert that he is a "person aggrieved" by a search and seizure, when he is a corporate supervisory employee and his office and the other mine offices that he visits in the regular course of his employment and in which he conducts corporate business are searched and records which are his responsibility for maintaining are seized by special federal marshals.

ARGUMENT

Petitioner submits that he is a "person aggrieved" within the purview of the Fourth Amendment and Federal Rule of Criminal Procedure 41(e) and that he had a reasonable expectation of privacy in said six mine offices and that said privacy was invaded by the illegal intrusion of the government.

A review of the facts of the leading cases discussing standing of persons aggrieved under

Federal Rule of Criminal Procedure 41(e) illustrates clearly that Petitioner was a person aggrieved and, therefore, had standing to contest the searches and seizures of evidence at the above cited six mine offices.

In Jones vs. U.S. 362 U.S. 257 (1960) which is still considered a leading "standing" case, the status of a guest in the search and seizure area was before this Court. Jones was a guest in an apartment when an unlawful search disclosed narcotics, possession of which is a crime. Although he denied any connection with the narcotics, the Court, nevertheless, held that the exclusionary rule protected him also since Federal Rule Of Criminal Procedure 41(e), as redefined, covered "anyone legitimately on the premises where a search occurs". Jones, it was held, was "a person aggrieved by an unlawful search and seizure" under Federal Rule Of Criminal Procedure 41(e) and thus had standing to move to suppress the seized evidence.

The case of Mancusi v. DeForte, 392 U.S. 364 (1968) is directly in point with the case at bar. The facts of Mancusi v. DeForte, supra, are briefly, as follows: Petitioner DeForte was an officer in the Teamsters Local Union No. 266 and his office which was shared with other union officials was illegally searched by New York state officials. The Court per Justice Harlan, held that DeForte had standing to contest the search of the entire union office; even though, said office consisted of one large room which he shared with several other union officials. Further, the Court stated the following on this point, to-wit:

> It seems to us that the situation was not fundamentally changed because DeForte shared an office with other union officers. DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in DeForte's custody. It is, of course, irrelevant that the

> Union or some of its officials might validly have consented to a search of the area where the records were kept, regardless of DeForte's wishes, for it is not claimed that any such consent was given, either expressly or by implication. (392 U.S. 369-370)

In addition, the Court in Mancusi v. DeForte, supra, at p. 368, cites Katz v. U. S., infra, for the following proposition of law, to-wit:

> The Court's recent decision in Katz v. United States, 389 U.S. 347, 19 L Ed 2d 576, 88 S. Ct. 507, also makes it clear that capacity to claim the protection of the (Fourth) Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. See 389 U.S. at 253, 19 L Ed 2d at 582. The crucial issue, therefore, is whether in light of all the circumstances, DeForte's office was such a place.

This Court then held that DeForte's shared union office was a place where he had a reasonable expectation of privacy.

The government concedes that Defendant Marks was at his office in Georgetown when said searches and seizures took place, therefore, the Court's holding in Jones and DeForte gives him standing to contest the search and seizure at the Georgetown General Offices of Consol.

In Brown v. U.S., 411 U.S. 223, 229, (1973) this Court laid down the following general rule as to standing:

> "In deciding this case, therefore, it is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a)were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure."

Thus, Petitioner submits that Brown v. U. S., supra, gives him "standing" not only to challenge the illegal search and seizure of his private office at Georgetown, but also, "standing" to challenge the illegal searches and seizures at all of the six mine

offices listed above; since, (1) he, as Chief Environmental Technician visits each of said six locations, and conducted environmental business therein; (2) he is responsible as Chief Environmental Technician for all of Consol's respirable dust records; and (3) he was charged by the government with conspiring with the individual technicians, the Safety Director and Consol. The charges were defrauding the government and violating the Federal Coal Mine Health and Safety Act. Thus, Defendant Marks as a co-conspirator was charged by the government with the possession of evidence, mere possession of which was evidence of an offense pursuant to the government interpretation of the Coal Mine Health and Safety Act; ie., possession of exposed respirable dust cassettes and their mine data cards. Accordingly, Petitioner has standing to challenge the searches and seizures at all of the above cited offices.

Further, the government argued in the Sixth Circuit, that the district court erred in not having an evidentiary hearing as to Petitioner's standing, even though, the government never requested such a hearing or contested the factual allegations of Petitioner.

Federal Rule of Criminal Procedure 41(e) provides in pertinent part, as follows:

> "...The judge shall receive evidence on any issue of fact necessary to the decision of the motion."

The above quoted language has been construed by the courts to require an evidentiary hearing when there are contested facts and a request is made for such hearing. (Emphasis added.) Thus, in U.S. v. Ledesma, et al., 499 F.2d 36, at 39 (1974) the court citing Cohen v. U.S., infra, stated the applicable law on this issue, as follows:

> "[1] There was no predjucial error in refusing to grant Quiroz-Santi an evidentiary hearing on his motion to suppress. Rule 41(e), Federal Rules of Criminal Procedure, provides that the court 'shall receive evidence on any issue of fact necessary to the decision of the motion.' Evidentiary hearings need not be set as a matter of course, but if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of the search are in question, an evidentiary hearing is required. Cohen v. United States, 378 F.2d 751, 760-761 (9th Cir.) cert. denied, 389 U.S. 897, 88 S.Ct. 217, 19 L.Ed. 2d 215 (1967)."

Thus, in order for the government to be entitled to an evidentiary hearing it must (1) file a motion requesting such a hearing and (2) state in said motion with specificity the contested issues of fact, which are going to be the subject of said evidentiary hearing.

However, in the case at bar, the government has neither requested an evidentiary hearing nor contested any facts asserted by Petitioner.

Instead, the government has chosen to argue the law to be applied to the facts submitted by this Petitioner.

Accordingly, the district court having no factual dispute before it as to the activities of Petitioner at each of the above cited environmental offices of Consol properly held that Petitioner had standing to suppress the items seized from said locations.

CONCLUSION

Petitioner respectfully submits that for the foregoing reasons and the reasons stated in the Petition for Writ of Certiorari filed in this Court by Petitioner's Co-Petitioner, Consolidation Coal Company, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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